Supreme Court, U.S.
FILED
OCT 21 1994
OFFICE OF THE CLERK

No. 94-531

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

STEVEN AUGUSTUS, *et al.*,
Petitioners,

v.

STATE OF LOUISIANA, THROUGH ITS GOVERNOR, EDWIN EDWARDS, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Louisiana

---

RESPONDENTS' BRIEF IN OPPOSITION

HENRI WOLBRETTE, III
Counsel of Record
ROGER C. LINDE
JAMES GARNER
McGLINCHEY STAFFORD LANG
A Law Corporation
643 Magazine Street
New Orleans, LA 70130
(504) 586-1200
Attorneys for Respondents

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

18 pp

QUESTIONS PRESENTED

(1) Whether the Louisiana Supreme Court acted properly when it denied the application for writs of certiorari and mandamus and supervisory and remedial writs on a decision of the Louisiana Court of Appeal for the Fifth Circuit which found that the judges of the Twenty-Fourth Judicial District Court, Parish of Jefferson, are judicially immune from a suit against them to return the fees collected pursuant to La. Rev. Stat. § 13:994.

(2) Whether the statute of limitation properly bars petitioners' actions.

(3) Whether the Louisiana courts acted properly when they failed to find that the petition stated a cause of action under the due process clause and 42 U.S.C. § 1983 because of La. Rev. Stat. § 47:1401 *et seq.*

(4) Whether the petitioners stated any cause of action for a federal constitutional tort.

(5) Whether defendants' exceptions of no right of action should have been denied because of defendants' sovereign immunity.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. INTRODUCTION	4
II. THE DISTRICT COURT AND THE APPELLATE COURT CORRECTLY APPLIED JUDICIAL IMMUNITY AND BARRED ANY CAUSE OF ACTION AGAINST THE 24TH JDC JUDGES	5
A. Judicial Immunity	5
B. Legislative Immunity	5
C. Prosecutory or Administrative Immunity	5
III. PRESCRIPTIVE PERIOD	8
IV. LA. REV. STAT. § 47:1401 *ET SEQ.* CREATES NO CAUSE OF ACTION UNDER THE 14TH AMENDMENT DUE PROCESS CLAUSE AND 42 U.S.C. § 1983	10
V. PETITIONER ATTEMPTS FOR THE FIRST TIME TO RAISE ISSUES REGARDING THE ALLEGED LACK OF IMPARTIALITY OF THE LOUISIANA JUDICIARY	11
CONCLUSION	12

TABLE OF AUTHORITIES

Cases	Page
Bates v. State Bar of Arizona, 433 U.S. 350, 97 S.Ct. 2692, 53 L.Ed.2d 810 (1977)	7
Dean v. Nunez, 503 So.2d 212 (La. App. 4th Cir. 1987), *writ denied*, 507 So.2d 1229 (La. 1988)	8
Duplantis v. Bonvillain, 675 F.Supp. 331 (E.D. La. 1987)	9
Elzy v. Robinson, 868 F.2d 793 (5th Cir. 1989)	8
General Credit Plan, Inc. v. Pearson, 341 So.2d 1238 (La. App. 1st Cir. 1976)	10
Hedges Ward Parrington Properties, Inc. v. Lee, 601 So.2d 358 (La. App. 5th Cir. 1992)	10
Huddleson v. Bossier Bank & Trust Company, 475 So.2d 1082 (La. 1985)	7
Imbornone v. Early, 401 So.2d 953 (La. 1981)	8
International Federation of Flight Attendants v. Zipes, 491 U.S. 754, 109 S.Ct. 2732, 105 L.Ed.2d 639 (1989)	7
Jones v. Orleans Parish School Board, 688 F.2d 342 (5th Cir. 1982), *rehearing denied*, 693 F.2d 133, *appeal dismissed, cert. denied*, 103 S.Ct. 2420 (1983)	8
Moresi v. Department of Wildlife and Fisheries, 567 So.2d 1081 (La. 1990)	6
Perez v. Griffin, 849 F.2d 172 (5th Cir. 1988)	8
Plaquesmines Parish Commission Council v. Delta Development Corp., 502 So.2d 1034 (La. 1987)	9
Pulliam v. Allen, 466 U.S. 522, 104 S.Ct. 1970, 80 L.Ed.2d 565 (1984)	5, 6
Rubris v. O'Koren, 621 F.2d 114 (5th Cir. 1980)	9
Steece v. Louisiana, 504 So.2d 984 (La. App. 1st Cir. 1987)	
Supreme Court of Virginia v. Consumers Union, 466 U.S. 719, 100 S.Ct. 1967, 64 L.Ed.2d 641 (1980)	5, 7

Statutes	
La. Civ. Code 3491 (1)	10
La. Civ. Code 3499	10
La. Code Civ. P. art. 595	7

TABLE OF AUTHORITIES—Continued

Page

La. Code Civ. P. art. 1878 ..... 1, 7
La. Rev. Stat. § 13:1994 ..... i, 1, 2, 6, 7, 12
La. Rev. Stat. § 15:41 10
La. Rev. Stat. § 47:1401 *et seq.* ..... i, 10, 11
42 U.S.C. § 1983 ..... i, 1, 10
42 U.S.C. § 1983 *et seq.* 8
42 U.S.C. § 1988 ..... 2, 3, 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-531

STEVEN AUGUSTUS, *et al.*,
Petitioners,

v.

STATE OF LOUISIANA, THROUGH ITS GOVERNOR, EDWIN EDWARDS, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Louisiana

---

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

On April 12, 1991, petitioners filed an action under 42 U.S.C. § 1983 in the United States District Court for the Eastern District of Louisiana (hereinafter the "Federal Court Case") seeking a declaratory judgment and injunctive relief and alleging that the judges of the Louisiana Twenty-Fourth Judicial District Court ("24th JDC Judges") had violated plaintiffs' civil rights under color of law by implementing and enforcing the provisions of La. Rev. Stat. § 13:994.[1] The injunctive relief

---

[1] La. Rev. Stat. § 13:994 imposes a two percent fee on all bail bonds. Petitioners also made similar claims which affected judges in Orleans Parish and Terrebonne Parish.

sought was two-fold: A mandatory injunction ordering the judges to return collected fees and a prohibitory injunction ordering the judges to cease enforcing the statutes. Plaintiffs further sought attorney's fees pursuant to 42 U.S.C. § 1988. The plaintiffs moved for a preliminary injunction with regard to enforcement of the statute and the case was tried before the Honorable Henry Mentz on stipulated facts. On July 24, 1991, Judge Mentz rendered judgment in favor of plaintiffs and found that La. Rev. Stat. § 13:994 and the related statutes were unconstitutional. Judge Mentz enjoined the continued enforcement of La. Rev. Stat. § 13:994. The Court did not rule on the issue of attorney's fees. Defendants dismissed their appeal, and plaintiffs never appealed.

Six months later on January 16, 1992, petitioners filed this action against the 24th JDC Judges, judges in Terrebonne Parish and Orleans Parish and others, and sought reimbursement of the collected fees with interest together with attorney's fees. Petitioners further sought class certification and declaratory judgment that La. Rev. Stat. § 13:994 and similar statutes applicable in Orleans and Terrebonne Parish have violated both the United States and Louisiana constitutions. On July 30, 1992, the 24th JDC Judges and all other defendants filed a Preemptory Exception of Res Judicata, Preemptory Exception of Prescription,[2] Preemptory Exception of No Cause of Action and a Preemptory Exception of No Right of Action. The district court maintained the exceptions of no cause of action, no right of action and prescription. The Louisiana Court of Appeals for the Fifth Circuit affirmed the district court's decision and the Louisiana Supreme Court denied writs.

---

[2] The Louisiana doctrine of prescription is comparable to the common law statute of limitation.

SUMMARY OF ARGUMENT

The petitioners initiated this "copy cat" proceeding in the Twenty-Fourth Judicial District Court, in which they seek to have statutes declared unconstitutional under the federal and state laws and seek attorney's fees and return of the fees paid. The trial court and the appellate court correctly maintained the exception of no cause of action when they applied the doctrine of judicial immunity. A judge has immunity from such actions taken pursuant to his judicial or legislative duties.

The trial court and the appellate court correctly maintained the exception of no cause of action when they applied the doctrine of sovereign immunity. The only types of suits in which the state's sovereign immunity has been waived are suits in contract or tort. This suit is not a suit in contract or tort.

The trial court correctly maintained the exception of no cause of action. While a federal claim may exist pursuant to 42 U.S.C. § 1988, under Louisiana law there is no cause of action for a constitutional tort.

The trial court correctly applied a one year prescriptive period and found that the suit for constitutional torts was not timely. Regardless of how the appellants now style their causes of action, they clearly brought suit based on the constitutionality of the statutes in question and sought return of the fees. The suit is virtually identical to the federal suit, which they earlier brought, and which is now concluded.

ARGUMENT

Defendants G. Thomas Porteous, Jr., Ernest B. Richards, IV, Susan Chehardy, Walter E. Kollin, Clarence E. McManus, Patrick J. McCabe, M. Joseph Tiemann, Hubert A. Vondenstein, Charles E. Cusimano, II, Jacob L. Karno, Douglas Allen, Robert J. Burns, Allen Oser, Ronald P. Loumiet, Martha Sasson, Jo Ellen Grant and Joseph G. Grefer, Judges of the Twenty Fourth Judicial District Court (collectively "24th JDC Judges"), respectfully submit that the district court properly sustained their Exception of No Right of Action, Exception of No Cause of Action and Exception of Prescription, that the Appellate Court correctly affirmed the decision of the District Court and that the Louisiana Supreme Court correctly denied the writ application.[3]

I. INTRODUCTION

Appellants argue on several grounds that this matter should not have been dismissed.[4] Most of these arguments do not directly relate to the ruling of the District Judge or the ruling of the Appellate Court. The 24th JDC Judges would respectfully direct this Court's attention to the actual exceptions maintained by the District Judge and affirmed by the Appellate Courts. With regard to the 24th JDC Judges, the District Judge found that: (1) judicial immunity bars petitioners' lawsuit; (2) there is no such cause of action under Louisiana state law for

---

[3] The district court also maintained the exceptions of the State of Louisiana, the judges of Orleans Parish and the judges of Terrebonne Parish. In order to promote economy, the 24th JDC Judges have not briefed all issues herein, but instead adopt all the arguments contained in the briefs of all co-defendants. More specifically, the 24th JDC Judges adopt the arguments that the plaintiff stated no cause of action for federal constitutional tort, that sovereign immunity bars any claim, and that petitioners state no cause of action for return of any fees.

[4] In this appeal, Petitioners have apparently abandoned many of the grounds for appeal raised in the state proceedings.

a "constitutional tort"; and (3) the one year prescriptive period bars any such constitutional tort. The lower courts found that the doctrine of sovereign immunity and judicial immunity would bar any such action against the 24th JDC Judges.

II. THE DISTRICT COURT AND THE APPELLATE COURT CORRECTLY APPLIED JUDICIAL IMMUNITY AND BARRED ANY CAUSE OF ACTION AGAINST THE 24TH JDC JUDGES

In their suit petitioners seek to recover from the 24th JDC Judges, various Orleans Parish judges and Terrebonne Parish judges and the State of Louisiana amounts paid into the judicial fund and for attorney's fees in bringing this action. The doctrine of judicial immunity bars such a claim in the following three ways:

A. *Judicial Immunity.* Judges enjoy absolute immunity from liabilities for acts performed in their judicial capacities, which extends to all claims except those claims for prospective injunctive relief. *Pulliam v. Allen*, 466 U.S. 522, 541-42, 104 S.Ct. 1970, 1982, 80 L.Ed. 2d 565, 579 (1984).

B. *Legislative Immunity.* When judges are engaged in rulemaking rather than adjudication, they act as legislators. In this capacity judges enjoy absolute immunity from both damage claims and injunctive relief. *Supreme Court of Virginia v. consumers Union*, 466 U.S. 719, 732-33, 100 S.Ct. 1967, 1974-75, 64 L.Ed. 2d 641, 653-54 (1980).

C. *Prosecutory or Administrative Immunity.* Judges may also act in an enforcement capacity, and in such cases they enjoy prosecutory immunity, which insulates them from damages and liability, although not from injunctive relief. *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 736-37, 100 S.Ct., 1967, 1977, 64 L.Ed. 2d 641, 656 (1980).

Indeed, the Louisiana Supreme Court held that when an official performs a function integral to the judicial process or a traditional legislative function, the official is absolutely immune from damage liability for acts performed in those capacities. *See, Moresi v. Department of Wildlife & Fisheries*, 567 So.2d 1081 (La. 1990).

In the federal action, the plaintiffs sought and obtained an injunction which barred the judges from enforcing La. Rev. Stat. § 13:994 and the rules promulgated thereunder. The injunction was clearly directed to the judges in their judicial capacities. *See Pulliam v. Allen, supra*, 466 U.S. at 527-28, 104 S.Ct. at 1972-73, 80 L.Ed.2d at 569-70 (incarceration by justice of peace of defendants who do not post bail treated as a judicial function for immunity purposes). The Court could order the 24th JDC Judges not to enforce the statute. However, in promulgating rules under La. Rev. Stat. § 13:994 for the collection of fees, the judges acted in a legislative capacity and in that capacity there were and are absolutely immune from suit for return of the fees and attorney's fees.

The Court in *Consumers Union* considered a similar situation. In that case, plaintiffs were members of a consumer group which sued the Supreme Court of Virginia to annul the stringent ban on advertisement which the court had mandated in its capacity as the regulatory authority for the Virginia bar. 446 U.S. at 725-26, 100 S.Ct. at 1971, 64 L.Ed.2d at 649. The Supreme Court struck down the Virginia Court's disciplinary rule as unconstitutional. On remand, the plaintiffs moved for costs, including an award of attorney's fees pursuant to 42 U.S.C. § 1988. On certiorari, after remand, the United States Supreme Court explained that the chief justice was properly barred from enforcing the rules, because the Virginia statute gave the state supreme court independent authority to initiate proceedings against attorneys. 446 U.S. at 736, 97 S.Ct. at 1977, 64 L.Ed.2d at 656. However, the District Court had awarded attorney's fees because the Virginia court declined or failed to adopt the

proposal of the Virginia State Bar which implemented the Supreme Court's decision in *Bates v. State Bar of Arizona*, 433 U.S. 350, 97 S.Ct. 2692, 53 L.Ed.2d 810 (1977) (enforcement of a ban on an attorney advertising violated the first and fourteenth amendment rights of the attorney seeking to advertise fees charged for certain routine legal services). In overturning the award of attorney's fees, the Supreme Court in *Consumers Union* held that the Virginia court was properly enjoined in its enforcement function but that it was improperly assessed with attorney's fees in its legislative function, 446 U.S. at 739, 100 S.Ct. at 1978, 64 L.Ed.2d at 658.

In this case, Judge Mentz entered a declaratory judgment which directed the judges to stop enforcing La. Rev. Stat. § 13:994. In enforcing La. Rev. Stat. § 13:994, the judges only enforced a law which was valid on its face. Clearly there can be no "further relief" based on this declaratory judgment against the 24th JDC Judges for return of the fees.

If the petitioners have no claim against the 24th JDC Judges for return on the fees, the only remaining claim is for attorney's fees. The petitioners have no cause of action against the 24th JDC Judges for attorney's fees. The rule in Louisiana is that attorney's fees are not recoverable except where expressly provided by statute or contract. *Huddleson v. Bossier Bank & Trust Co.*, 475 So.2d 1082, 1085 (La. 1985). Plaintiffs claim they are entitled to attorney's fees under the authority of La. Code Civ. Proc. art. 1878 and/or La. Code Civ. Proc. art. 595 and/or 42 U.S.C. § 1988. None of these statutes create such an entitlement in the instant case. Because the doctrine of judicial immunity bars any claim on the merits, the 24th JDC Judges are immune from suit on the merits and the petitioners cannot recover attorney's fees. *Independent Federation of Flight Attendants v. Zipes*, 491 U.S. 754, 762-63, 109 S.Ct. 2732, 2737, 105 L.Ed.2d 639, 649-50 (1989).

Petitioners have argued that the 24th JDC Judges can be subject to mandamus or a mandatory jurisdiction to return the fees in an administrative capacity. Such an argument is without foundation. The only case cited by petitioners is *Imbornone v. Early,* 401 So.2d 953 (La. 1981). The *Imbornone* decision does not address an attempt to collect fees or attorney's fees. Rather, it involves an attempt by one judge to keep his chambers from being taken by another judge. That situation clearly is not an instance of judicial immunity and would be inapplicable in this case. Further, petitioners improperly argue that mandamus or a mandatory injunction can be used to avoid the clear precedent that no damages are recoverable against a judge. Further, there are no damages or fees to be recovered from the 24th JDC Judges. The petitioners paid the fees to the State of Louisiana and the 24th JDC Judges do not possess the funds. As stated by co-defendants, sovereign immunity bars any claim against the state. If plaintiffs have any claims at all, which is denied, they should have submitted these claims to the Louisiana Board of Tax Appeals as asserted by the Appellate Court.

III. PRESCRIPTIVE PERIOD

The District Court ruled correctly when it found that the one year prescriptive period barred any claims for the constitutional torts asserted by petitioners. Challenges to the constitutionality of a state statute under the United States constitution and 42 U.S.C. § 1983, *et seq.*, prescribe in one year. *See Jones v. Orleans Parish School Board*, 688 F.2d 342 (5th Cir. 1982), *rehearing denied*, 693 F.2d 133, *appeal dismissed, cert. denied*, 103 S. Ct. 2420 (1983); *Elzy v. Robinson*, 868 F.2d 793 (5th Cir. 1989); *Perez v. Griffin*, 849 F.2d 172 (5th Cir. 1988); *Dean v. Nunez*; 503 So.2d 212 (La. App. 4th Cir. 1987), *writ denied*, 506 So.2d 1229 (La. 1988). Further, the action accrues when the plaintiff knows or has reason to know the injury which is the basis of the section 1983

action. *Duplantis v. Bonvillain*, 675 F. Supp. 331 (E.D. La. 1987); *Rubris v. O'Koren*, 621 F.2d 114 (5th Cir. 1980). Thus, it is clear that the constitutional claims of the Jefferson Parish criminal defendants/plaintiffs are prescribed because they knew or should have known of or had sufficient information to mandate an investigation of their injury when they paid or promised to pay their bail bond fees.

The doctrine of *contra non valentum* does not prevent the running of prescription. The Louisiana Supreme Court in *Plaquemines Parish Commission Council v. Delta Development Corporation*, 502 So.2d 1034, 1055 (La. 1987), thoroughly discussed *contra non valentum* [5] and identified the following three fact situations in which the doctrine would apply: (1) where there was some legal cause which prevented the courts or their officers from taking cognizance of or acting on the plaintiff's action; (2) where there was some condition coupled with the contract or connected with the proceedings which prevented the creditor from suing or acting; and (3) where the debtor himself had done some act effectually to prevent the creditor from availing himself of his cause of action.

None of these fact situations applies in the present case. Nothing at any time prevented any of the petitioners from making or ascertaining the claim that the statues in question were unconstitutional. Petitioners made a stilted argument that prescription cannot begin to run until the courts determine that the statutes are unconstitutional. Under that analysis prescription would never begin to run and any and all statutes and actions would always be opened to a challenge of constitutionality. The

---

[5] The equitable doctrine of *contra non valentum agere nulla curiet praescription* literally means that prescription does not run against one unable to act. 502 So.2d at 1037 n.5. The doctrine applies when one is effectively prevented from availing oneself of the cause of action by affirmative acts of concealment, misrepresentation and fraudulent conduct. 502 So.2d at 1037-38.

24th JDC Judges at no time did anything whatsoever to prevent the filing of a challenge of constitutionality and indeed could have done nothing to prevent such a filing at any time.

Other prescriptive periods would not apply. The ten year prescriptive period applicable for quasi contractual claims does not apply here. La. Civ. Code art. 3499. No quasi contractual claims are asserted in this matter. The two year prescriptive period provided under La. Rev. Stat. § 15:41 does not apply. La. Rev. Stat. § 15:41 has nothing to do with claims for possession of a fund; rather La. R. Stat. § 15:41 is a statute that provides for the disposition of "property seized" in connection with a criminal proceeding. *General Credit Plan, Inc. v. Pearson,* 341 So.2d 1238, 1241 (La. App. 1st Cir.).

The three year prescriptive period contained in La. Civ. Code art. 3491(1) does not apply. This article governs prescriptions of actions by public officials to recover fees and emoluments from others, not actions against public officials by others to recover fees or emoluments. *Steece v. Louisiana,* 504 So.2d 984, 986 (La. App. 1st Cir. 1987).

IV. LA. REV. STAT. § 47:1401 *ET SEQ.* CREATES NO CAUSE OF ACTION UNDER THE 14TH AMENDMENT DUE PROCESS CLAUSE AND 42 U.S.C. § 1983

Petitioners assert that they state a cause of action under the Due Process Clause and 42 U.S.C. § 1983 because of La. Rev. Stat. § 47:1401 *et seq.* The constitutionality of La. Rev. Stat. § 47:1401 *et seq.* is not an issue and has never been an issue in this lawsuit. At no time until the writ application to the Louisiana Supreme Court did petitioners ever assert that La. Rev. Stat. § 47:1401 *et seq.* is unconstitutional. *Hedges Ward Parrington Properties v. Lee,* 601 So.2d 358, 360 (La. App. 5th Cir. 1992). Thus, any such argument is waived at this stage. Re-

gardless, La. Rev. Stat. § 47:1401, *et seq.* provides that proceedings to recover funds from the State of Louisiana are to be heard by the Board of Tax Appeals. Thus, the petitioners erroneously assert that Louisiana has failed to provide any means to obtain a refund. La. Rev. Stat. § 47:1401, *et seq.* clearly provides for a process in which an individual can make a claim against the State of Louisiana before the Louisiana Board of Tax Appeals to obtain a refund.

V. PETITIONER ATTEMPTS FOR THE FIRST TIME TO RAISE ISSUES REGARDING THE ALLEGED LACK OF IMPARTIALITY OF THE LOUISIANA JUDICIARY

Petitioners have never raised the issue of the perceived impartiality of the Louisiana judiciary in this manner. Indeed the Louisiana judiciary has agreed with the federal court's determination that the statutes in question were indeed unconstitutional. To wait until this late date simply is improper and the Court should not consider claims made by petitioner regarding any alleged impartiality by the judiciary of the State of Louisiana.

CONCLUSION

This Court should deny Petitioners' writ application. The district court, appeals court and Louisiana Supreme Court correctly found that the 24th JDC Judges were protected by the doctrines of judicial immunity and sovereign immunity. The judges only implemented the provisions of the La. Rev. Stat. § 13:994. The 24th JDC Judges did nothing more. In enforcing express laws passed by the Louisiana Legislature, they are entitled to the protection of immunity.

Regardless of assertions to the contrary, Petitioners state no action for deprivation of constitutional rights. Alternatively, a one year prescription period bars Petitioners' claims. The doctrine of *contra non valentum* does not apply. The 24th JDC Judges did nothing whatsoever and could do nothing to prevent the petitioners from maintaining their cause of action. Therefore, this Court should deny this application for writs.

Respectfully submitted,

HENRI WOLBRETTE, III
Counsel of Record
ROGER C. LINDE
JAMES GARNER
MCGLINCHEY STAFFORD LANG
A Law Corporation
643 Magazine Street
New Orleans, LA 70130
(504) 586-1200
Attorneys for Respondents